In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED INSURANCE COMPANY OF AMERICA

AND

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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JURISDICTION

The judgment of the court of appeals was entered on December 21, 1966 (App. A, *infra*, p. 34). On March 21, 1967, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including May 20, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The protections of the National Labor Relations Act extend only to employees—a category which excludes "any individual having the status of an independent contractor" (Section 2(3)). In this case, the National Labor Relations Board found that "debit agents" of an insurance company were employees within the meaning of the Act. The question presented is whether, in setting aside this determination, the court of appeals overstepped the proper bounds of judicial review and applied erroneous legal principles.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in App. B, *infra*, pp. 35–36.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

United Insurance Company of America ("United") is engaged in the writing and sale of insurance [2]

[2] United writes and sells industrial and ordinary life insurance, and industrial and commercial health, accident, and hospitalization insurance (J.A. 396–397). It also handles fire insurance written by United Fire Insurance Company. (J.A. 25, 46, 63–67, 1062–1963).

through its home office in Chicago, Illinois, and district offices located in most states. Every district office has a manager and several assistant managers. Each assistant manager is in charge of a staff of four or five individuals called "debit agents"; United has a total of about 3300 such agents. (J.A. 1126, 1165; 41–42, 396–397, 421, 459, 1045, 1046.)

On June 4, 1964, the Insurance Workers International Union filed a petition with the Board seeking certification as the collective bargaining representative of United's debit agents in Baltimore City and Anne Arundel County, Maryland. United asserted that the debit agents were "independent contractors" and not "employees" within the meaning of the Act, and the parties entered into a consent election agreement preserving United's right to contest this issue after the representation proceeding. The union won the election, was certified by the Board on August 14, 1964, and requested recognition from United on August 20. On September 1, United refused to recognize the union. Its only ground for this action was that the debit agents were independent contractors rather than employees. (J.A. 1122–1123, 1132; 8, 1045–1050.) This unfair labor practice proceeding ensued.[3]

The Board made the following findings with respect to the status of the debit agents:

1. HIRING AND JOB ASSIGNMENT

United obtains debit agents through newspaper advertisements, referrals, and from other companies

[3] The union was the charging party before the Board, and an intervenor in the court of appeals proceedings brought by the company to review the Board's order.

(J.A. 403). A prospective agent must fill out an application provided by the company and be interviewed by a District Manager (J.A. 1139, 199–200, 725-727). No prior experience is required (J.A. 725–726, 768, 831).

Upon hiring an applicant, United places him in a particular district office, under the supervision of a particular assistant district manager (J.A. 1165; 40, 42, 147, 854).[4] The company then assigns him a "debit book." This book—which is company property and must be returned to the company upon the termination of the agent's service (J.A. 1155; 148–149, 473, 490)—contains the names and addresses of existing policyholders in a relatively concentrated geographic area. The debit agent's job is to collect premiums from the policyholders listed in this book, to prevent the lapsing of policies, and to sell such new insurance as time allows.[5] The collection of premiums occupies the bulk of the agent's time, since he works mainly with industrial insurance which, unlike ordinary insurance, is written in amounts of less than $1,000 and provides for the payment of premiums on a weekly

[4] The company may thereafter transfer him to a different location or supervisor (J.A. 1157; 292–294, 480–481). The agent's business card contains the phone number and address only of the district office to which he is assigned (J.A. 757–758).

[5] Either the agent or the company obtains a license from the State, costing from $2.50 to $10.00, which specifically permits the agent to sell insurance for the company. In some instances the company pays for the license; in others, the agent pays for it (J.A. 1138–1139; 24–26, 694, 728, 755, 811). However, the company always pays for the cost of renewing the license (J.A. 1138; 881).

basis.[6] (J.A. 1137–1138, 1150, 1155, 1169; 23–24, 40–44, 95, 186–187, 216–217, 357, 397–398, 417–418, 694–695, 700–701, 727, 740–741, 756, 815–817, 838, 854, 860–863.)

A debit agent may not, at his discretion, transfer policies or exchange all or part of his "debit" with another agent; company approval is required (J.A. 1160–1163; 74–75, 138–140, 148–149, 243–245, 248–251, 340–342, 359–362, 376–377, 841, 1065). And while debit agents may occasionally collect for each other, they do not have regular employees (J.A. 1140–1141; 148, 219–223, 456–457, 723, 788).

2. COMPENSATION AND EXPENSES

United directly compensates the debit agents pursuant to the "Agent's Commission Plan." The plan—which is unilaterally promulgated by the company, is uniform as to all agents, and must be signed by each agent when he is hired[7] (J.A. 1175; 27, 183, 185, 491–494, 1051–1059)—basically provides that a debit agent may retain 20 percent of his weekly premium collection (J.A. 1175; 1051).[8] The company also pro-

[6] While United does not require an agent to work any specific number of hours, it expects him to obtain a high percentage of collections, to avoid policy lapses, and to bring in new business (J.A. 1141, 1143; 131, 238–239, 343, 440, 491, 519, 770–771, 822–825).

[7] The company may amend the plan at any time and existing agents may then choose to work under the plan they originally signed or under the new arrangement. New agents, however, must accept the most recent plan. (J.A. 1175; 491–494, 706, 893.)

[8] The agent also receives 10 percent of the premiums collected from holders of ordinary insurance, and 50 percent of the first year's premium on new ordinary insurance sold by him (J.A. 1056–1057). Unlike the industrial insurance premiums, the agent remits the entire ordinary premium to the company and the

vides a "service award bonus," essentially a vacation-with-pay plan under which an agent may take one or two weeks off depending on whether he has one or two years' service with the company and be paid a percentage of the average of his earnings for the previous four weeks. Agents choose their vacation periods on the basis of seniority after their assistant manager has selected his. While the agent is on vacation, the assistant manager collects and sells new business for him, for which the agent receives the usual commissions and credits. (J.A. 1153, 1154, 1156–1157, 1164–1165; 146–148, 474–476, 646–647, 752.)[9] Debit agents participate in the group insurance plan and profit-sharing pension fund maintained by the company, and the amounts contributed by them are supplemented by the company (J.A. 1176–1177; 71–73, 890, 891, 904, 1098–1104). The company also pays

company then pays him the percentage owed (J.A. 812–815). The "Agent's Commission Plan" also provides for weekly bonuses, ranging from 2 to 5 percent of weekly collections, to agents whose collections average 95 percent or more of the premiums due and who have average increases of 50 cents per week (J.A. 1051–1052). In addition, an agent is credited with a reserve account, essentially composed of premiums on new policies sold by him minus premiums on lapsed policies; and the company adds to this reserve a quarterly bonus if the agent has a 92 percent or better collection average and a 50-cent weekly increase. From this reserve an agent with a 90-percent or better collection average may draw $1.00 to $3.50 weekly, depending on his collection average and the size of the reserve. He may sell his reserve to the company every six months if he has a 95-percent collection average and has serviced the debit for more than a year, but the company will not buy reserves exceeding $500.00. (J.A. 1052–1056.)

[9] Assistant managers similarly substitute for the agents when they are ill (J.A. 1164; 428, 566–567, 646–647).

employer social security taxes for the agents. (J.A. 1177; 704, 884–889, 923–925.)

In addition to the debit books, United supplies the agents, at its own expense, with rate and premium receipt books; application, transfer, lapse, and reporting forms; and various sales aids and brochures (J.A. 1144, 1166; 44–45, 92, 113–117, 747–748, 1060–1096). At the district offices, the company also provides the agents, free of charge, with work tables, chairs, office equipment such as adding machines, telephone service, clerical help, and the postage used in sending receipts to policyholders who have remitted their premiums by mail (J.A. 1179; 61, 97–98, 121–124, 298–302, 339–340, 446, 725, 1097). When an agent's debit covers a wide area or is a considerable distance from the district office, the company pays him an additional one percent of collection for travel expenses (J.A. 1155, 1176; 357–358, 375, 409–410, 447–448, 519–520, 617). The company assumes the losses resulting from theft of collection monies from agents (J.A. 1170–1173; 149–157, 211–212, 312, 513–516, 573–587, 1115–1116).

Except as noted, agents pay their own telephone, postage, and transportation expenses (J.A. 408–409, 540–541). Those who use business cards and distribute small gifts to their policyholders bear the expense involved (J.A. 1140; 408–409, 507–508, 617–618, 707–708, 757–759, 835, 851–852, 1114). Some agents set aside a work space in their homes and deduct the maintenance involved as a business expense for tax purposes, but none have regular offices for which they

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pay rent (J.A. 1179; 125, 230–231, 725, 761, 788, 821–822, 866–867.) Nor have they employees or regular assistants. They do no advertising and are not required to provide a bond. (J.A. 1140–1141; 71, 117–118, 148, 723, 788.)

3. SUPERVISION AND TERMINATION

The high ratio of managers and district managers to debit agents (see *supra,* p. 3) assures the company close supervision of the agents throughout their service (J.A. 1156, 1165; 42, 317, 355–356, 471). At the outset, the assistant manager accompanies a new agent on his rounds to acquaint him with his assigned debit and show him the approved selling and collection techniques (J.A. 459, 727). The agent is also supplied with a company "Rate Book" containing detailed instructions on how to perform many of his duties; the company requires the agent to follow these rules (J.A. 92, 483–484, 1068–1069).[10] Whenever it appears necessary to United, an assistant manager or other company official accompanies an agent on his rounds (J.A. 1164, 1166; 131–137, 517, 594, 722, 743–744). The manager or assistant manager may also call on a policyholder with the agent if a premium has not been collected by the twentieth of the month, and a "supervisor" must call on policyholders whose policies have lapsed (J.A. 1153, 1108, 1112). At least once a year, an assistant manager accompanies each agent on

[10] Managers must approve all applications for ordinary insurance obtained by agents in their first year of service, and, thereafter, must review every such application when the applicant has not had a medical examination (J.A. 1138; 1088, 1111).

a field inspection of the policyholders' premium receipt books (J.A. 568–569).

When a policyholder has not paid his premium for several weeks, the agent must report it on a lapse form, provided by United, which the manager must sign (J.A. 81–84, 1066–1067). Failure to make such a report before the fourth week of nonpayment renders the agent liable for premiums due thereafter (J.A. 620–623, 896–897). If a collection is made before the expiration of four weeks, the agent calls the office and has the listed policy removed from the lapse form (J.A. 82). The company requires the agent to carry lapsed policies in his debit book for 13 weeks (J.A. 362, 377–378, 896–897, 913).

Once each week, on a day designated by United, the agent is required to come to the district office in order to turn over the premiums collected, file weekly reports,[11] and attend staff meetings (J.A. 1144–1149, 1166; 41, 54–55, 126–127, 419, 450, 504–506).[12] The reports must be submitted on forms supplied by the company (J.A. 1148–1149; 54–59, 64–68, 420–421, 606, 1060–1064). The "Agent's Weekly Account" form shows the amount of increase or decrease in business for the week and year to date, the total of the debit, the amount of reserve the agent has accumulated, the

[11] In the "Agent's Commission Plan," *supra*, p. 5, the agent agrees to "promptly deposit with the Company all monies collected * * * and due the Company" and "warrants the accuracy of his accounts and records" submitted to the company (J.A. 1058).

[12] In special circumstances, a change in the schedule is permitted, or an assistant manager may direct an agent to meet him on the debit in order to turn in new business early (J.A. 1145–1147; 41, 332–334, 363–364, 379–380, 506, 720, 779).

amount of collections for the week, the agent's collection percentage, and the balance due the company (J.A. 1062–1063). The "Abstract of Agent's Weekly Report" provides a ready analysis of the funds which the agent must remit to the company; it also contains spaces for amounts to be paid to the company for social security tax, withholding tax, pension fund, and group insurance (J.A. 68–70, 884–885, 1064). The assistant manager reviews these reports, requires the agents to make the necessary changes, and approves them when correct. He then returns the reports to the agent, who deposits the reports and funds due the company with the company cashier. (J.A. 1148, 1164; 55, 482–483, 1060–1064.)[13] At the meetings, the managers discuss the latest bulletins and directives from the home office, familiarize the agents with policies on which production is low, ask for pledges of new business, demonstrate sales techniques, and explain new policies (J.A. 1145; 128–132, 529–531, 533, 796–800, 806–808).

At the end of every 13 weeks, the company requires each agent to make, on a form provided by the company, a complete audit of his debit book reflecting the actual paid-up status of each of his policyholders, and then to make a true cash accounting (J.A. 55–58, 1060–1061). In addition, the manager may order an audit of an agent's debit at any time (J.A. 613, 615).[14]

Complaints against an agent are investigated by the

[13] Agents may not settle their accounts by personal check without special permission (J.A. 1148; 68, 450).

[14] A few debit agents also handle claims for United, after first obtaining permission from management. The company turns

manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight" (J.A. 421, 451–452). Agents who have poor production records, or who fail to maintain their accounts properly or to follow company rules, are cautioned. If improvement does not follow, the company asks them to "resign," or exercises its right under the "Agents Commission Plan" to terminate them "at any time." (J.A. 1142–1143; 442–443, 466–467, 568, 569, 591–600, 609–610, 615–616, 721–722, 1120.)

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

On the basis of the foregoing facts, the Board (adopting, save in one particular, its trial examiner's decision) found that the debit agents were employees of United within the meaning of the Act, not independent contractors, and hence that United had violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the union that had been certified by the Board as the agents' representative in an appropriate unit. The Board's order requires United to cease and desist from the unfair labor practices found, to bargain with the union upon request, and to post appropriate notices. (J.A. 1179–1183, 1199–1200.) The court of appeals declined to enforce the Board's order, finding that the debit agents were independent contractors (App. A, *infra*, pp. 17–33).

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over the claim to the agent, who verifies it and then returns it for further processing and payment. An assistant manager may either accompany the agent when the latter is verifying the claim or may verify the claim independently. (J.A. 1167, 98–99, 273–277, 474, 521–522, 783–787, 846–849.)

REASONS FOR GRANTING THE WRIT

The court of appeals held in this case that United's "debit agents" were independent contractors rather than employees, and hence were outside the scope of protection of the National Labor Relations Act. This ruling is important not only to United's more than 3,000 debit agents, but to all insurance agents, and, beyond that, to the countless individuals who, although they work for a single company under the company's direction and control, do so for the most part "on their own"—a class that includes, for example, traveling salesmen, collection agents, newsboys and milkmen. The court's ruling also, we submit, conflicts with the purposes of the Act and with sound principles of judicial review.

1. The undisputed facts show that debit agents generally work full time for one company and do business in the company's name and under its detailed and continuous scrutiny, direction and control. They are paid strictly on a commission basis; they bear no risk of loss or opportunity of profit, make no investment of their own and have no independent business establishment. The company provides them with a paid vacation plan and other benefits incident to a normal employment relationship. The elements of independence in the overall relationship of agents to company are indeed minor. To regard these agents as self-employed or independent contractors strains reality.

The court of appeals nevertheless held all of this evidence "consistent with an independent contractor

status," stressing that many of the controls imposed by the company reflect business necessity independent of whether the company operates through employees or independent contractors (App. A, *infra*, pp. 27, 29), and on this basis set aside the Board's order. The significance of this ruling is that, if followed, it could deny the protection of federal labor legislation to a host of workers who have heretofore been regarded as employees even though, like debit agents, they do not perform their work primarily at the employer's place of business. Were it not for this fact, it would be plain that the debit agents were employees. To disregard the other elements of control and to make determinative the single fact that the agents work largely on their own—the apparent logic of the court of appeals' decision—is to curtail the application of the Act radically.[15] The propriety of this approach of the Seventh Circuit [16] is a question warranting review by this Court.

2. The ruling of the court of appeals is erroneous. The root of the error, we believe, is the court's view that those controls over the debit agents which are necessary to protect United's business interests could be given no weight by the Board in determining

[15] Save for the Seventh Circuit's earlier decision involving United's debit agents, *United Insurance Company of America* v. *National Labor Relations Board*, 272 F. 2d 446, the insurance industry has by and large in recent years accepted without judicial contest the Board's consistent view that debit and similar insurance agents are employees. See, *e.g.*, *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477, 479; *Metropolitan Life Insurance Co.*, 138 N.L.R.B. 512, 514.

[16] This is not the first case in which that circuit has followed such an approach. See n. 15, *supra*.

whether the agents were employees or independent contractors. In many instances, a company will find it impossible to carry out some of its functions without detailed controls over the agents who perform them; the mere fact that such controls may be necessary should not transform individuals who, in any realistic sense, are employees into independent contractors. The "business necessity" test enunciated by the court below opens up a major loophole in the protections of the Act—one which, as mentioned, appears to jeopardize the status of a large number of workers in the insurance and other industries.

3. The court also committed serious error by overstepping the proper bounds of judicial review. The application of the statutory concept of employment to the relationship of a particular company to its agents or workers involves an exercise of judgment that, we stress, is peculiarly within the province of the Labor Board rather than of the reviewing court. In making the determination required by the statute, a multitude of factors—all of the incidents of the relationship—must be assessed and weighed, and there are no hard-and-fast rules to guide decision. An administrative determination of this character is, accordingly, at the very heart of the specialized competence of the Board and should be accorded the highest deference by a reviewing court. So this Court has held with specific reference to the determination of "employee" under the Act. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130–

131.[17] The court below ignored the precepts of *Hearst* in upsetting the Board's determination—which, we submit, was reasonable [18] and therefore binding—that, all factors considered, the debit agents were properly to be classified as employees rather than as independent contractors. This error should be corrected in the interest of sound administration of the National Labor Relations Act.

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[17] Although Congress in 1947, by amending the definition of employee so as to exclude independent contractors, modified the substantive holding in *Hearst*, it did not alter that portion of *Hearst* dealing with the standard of review to be applied. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487–488; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 49–50; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 269.

[18] There is no merit to the suggestion of the court below (App. A, *infra*, pp. 29–32) that the Board's finding of employee status was tainted by the fact that the trial examiner made reference to the off-stand demeanor of the parties' representatives and their witnesses. First, the Board's finding rests largely on the undisputed facts. Second, a fair reading of the trial examiner's decision shows that his reference to off-stand demeanor was dictum, and played no part in his credibility determinations (see J.A. 1151–1152). Accordingly, contrary to the view of the court below, the Board could, as it did (J.A. 1200, n. 2), disavow the examiner's reference to off-stand demeanor without impairing the validity of his ultimate finding.

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CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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MAY 1967.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1966—September Session, 1966
Nos. 15266 & 15589

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AND

INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO INTERVENOR.

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AND

UNITED INSURANCE COMPANY OF AMERICA, INTERVENOR.

ON PETITIONS TO REVIEW AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

DECEMBER 21, 1966

Before KNOCH, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* These cases are before the Court upon the petition of United Insurance Company of America (Company) to review and set aside an order of the National Labor Relations Board issued against the Company July 28, 1965, a petition of Insurance Workers International Union, AFL-CIO (Union) to review the Board's order to the extent the order denied the Union the full relief it requested, and upon the cross-petition of the Board to enforce its order.[1] A motion of the Company to dismiss the Union's petition was taken with the case on the merits.

The Board found that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended, by its admitted refusal to bargain with the Union, the certified representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland.

The Company is engaged primarily in selling industrial life insurance, a form of ordinary life insurance in which the policies are written in amounts of less than $1,000 and the premiums are payable weekly, and for that purpose maintains district offices throughout the country. Each district office has a manager and several assistant managers, and each assistant manager heads a group of four or five debit agents. These debit agents, so-called for the reason

[1] The Union's petition was originally filed in the United States Court of Appeals for the District of Columbia Circuit. The Company thereafter filed its petition with this Court and it was transferred to the District of Columbia Circuit as provided by 28 U.S.C.A. § 2112(a). The Board cross-petitioned for enforcement of its order, and the D.C. Circuit transferred the proceedings to this Court where they were consolidated for hearing and disposition.

that "debit" describes the agent's book listing the policyholders from whom the agent collects premiums, spend most of their time in the collection of premiums, from policyholders residing in a given area. They also solicit applications for new insurance and for fire insurance written by another insurer whose business is also handled by the management and supervisors of the Company.

On June 4, 1964, the Union filed a petition with the Board seeking certification as the collective bargaining representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland. On March 16, 1964, the Company had entered into a reinsurance agreement with Quaker City Life Insurance Company, a Philadelphia, Pennsylvania corporation, under which, among other things not here pertinent, the Company reinsured the industrial life insurance policies issued by Quaker in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union. Upon the effective date of the reinsurance agreement (March 16, 1964) Quaker terminated all of its employees. Some of Quaker's former agents in Baltimore City and Anne Arundel County became agents of the Company. The policies they serviced, and the business they generated, were handled from the Company's Franklin Street district office in Baltimore, a location formerly utilized by Quaker. The debit agents here involved were about equally divided between that office and the company's St. Paul Street district office from which the Company had handled its policies in Baltimore prior to its reinsurance of Quaker's policies and continued to maintain.

On July 6, 1964, the Company and the Union entered into a stipulation for certification upon consent election which by its terms provided that the Company did not waive its contention that the debit agents in the unit were independent contractors and not employees within the meaning of the Act, and that the failure of the Company to contest that issue was limited solely to the representation proceeding. The Union won the election and was certified on August 14, 1964. On August 20, 1964, the Union requested recognition. On September 1, 1964, the Company denied that request. It based its refusal to bargain with the Union on the ground that the debit agents involved are independent contractors and not employees.

The Board ordered the Company to cease and desist from its refusal to bargain, to bargain with the Union upon request, and to post designated notices.

The Board's conclusion that the Company violated Section 8(a) (5) and (1) of the Act is predicated upon the Trial Examiner's findings and conclusions to the effect that the Company's debit agents in the Baltimore City and Anne Arundel County area unit here involved are employees within the meaning of the Act, which findings and conclusions the Board adopted.

The Company contends that the Board's order is not supported by substantial evidence on the record considered as a whole; that the findings and conclusions adopted by the Board are, in material part, the product of subjective conclusions drawn from the trial examiner's personal observations rather than from the evidence; that material comparative testimony, proffered by the Company, was erroneously excluded; and that at the most the testimony of the two witnesses credited and relied upon by the examiner can be regarded as establishing only that the unit was half "employee" and half "independent contractor".

The Union's contentions[2] are limited to its assertions that the Board erred in denying its requests that there be included in the Board's order a specific direction that the Company bargain concerning the fire insurance aspects of the debit agents' activities and a requirement that the Company, from the date of its refusal to bargain until the discharge of its bargaining obligations, apply to all of the debit agents in the unit the terms of a contract which allegedly had existed between Quaker and its former debit agents; and that the Union is entitled to challenge these aspects of the Board's order as a "person aggrieved". The Company's motion to dismiss the Union's petition in No. 15589 challenged the Union's status as an aggrieved person. The Board takes the position that while the Union is an aggrieved person in so far as jurisdictional purposes are concerned, and therefore this Court has jurisdiction of the Union's petition for review, the contentions of the Union with respect to the scope of the Board's order are wholly without merit.[3]

Two years prior to the Union's petition for certification in the instant matter the issue whether the Company's debit agents in Pennsylvania were Com-

[2] Except for those contentions urged by the Union as intervenor in No. 15266 in support of the Board's order.

[3] In view of our conclusion that the Board's order is not entitled to enforcement the Union's petition in No. 15589, and the Company's motion to dismiss that petition, are moot. Accordingly, we will not discuss the contentions of the parties with respect thereto. Suffice it to indicate that we agree with Board's position that the Union was entitled to petition for review of the Board's order insofar as it denied the additional relief the Union requested but that there is no merit to the Union's complaints. There was no necessity for a specific reference to the fire insurance activities. Bargaining orders need not specify each individual matter upon which an employer must bargain, particularly where, as here, the threshhold question is whether

pany employees or independent contractors was before this Court in *United Insurance Company of America* v. *N.L.R.B.*, 7 Cir., 304 F. 2d 86. This Court there observed:

> "In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do."

And citing *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company,* 7 Cir., 167 F. 2d 983, and *National Van Lines, Inc.* v. *N.L.R.B.,* 7 Cir., 273 F. 2d 402, the Court pointed out (304 F. 2d 89):

> "* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed."

but

> "The conclusion must be based on the 'total situation' looking at all of the facts in the particular case".

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there is an obligation to bargain. *Cf. San Antonio Machine & Supply Corp.* v. *N.L.R.B.*, 5 Cir., 363 F. 2d 633, 642. And, there is no basis in the record, either factually or legally, to support the Union's request concerning interim application of an alleged contract.

The Court held (304 F. 2d 90):

> "* * * the debit agents are independent contractors. A debit agent is 'on his own'. He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent '* * * is free to follow the superintendent's suggestion or to devise his own methods.' "

The Court rejected as insignificant the factors relied upon by the Board in support of its conclusion that the agents were employees, and in this connection the Court observed:

> "Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.
>
> There are many businesses, and the sale of insurance is one of them, where the management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose 'tools' are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies

> have established an employer-employee relationship such as the company in *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company,* [167 F. 2d 983] *supra.*"

With the critical test firmly established by *United Insurance Company of America* v. *N.L.R.B.,* 7 Cir., 304 F. 2d 86, and the decisions cited therein, and the nature of the various factors which may properly be considered in applying that test illustrated by that decision, we turn to an appraisal of the record before us giving full recognition to the fact that the issue presented is to be determined on the record *in this particular case. National Van Lines, Inc.* v. *N.L.R.B.,* 7 Cir., 273 F. 2d 402, 407.

Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by sustantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U.S. p. 489) as affording "[s]ome scope for judicial discretion" and approved with the express realization that "[t]here are no talismanic words that can avoid the process of judgment", and the admonitions (340 U.S. p. 488 and 496) that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight" and that the examiner's findings are not to be "given more weight than in reason and in the light of judicial experience they deserve" and "are to be considered along with the consistency and inherent probability of testimony". And *Universal Camera* makes it clear (p. 488) that:

> "[A] reviewing court is not barred from setting aside a Board decision when it cannot con-

> scientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

And in this connection *Eastern Greyhound Lines* v. *N.L.R.B.*, 6 Cir., 337 F. 2d 84, reiterates the pertinent observation made in *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 426, after a review of the relevant cases, that:

> "In a proper case [the reviewing court] may decline to follow the action of an examiner in crediting and discrediting testimony, even though the Board has adopted the Examiner's findings."

Similarly, in *Portable Electric Tools, Inc.* v. *N.L.R.B.*, 7 Cir., 309 F. 2d 423, 426, this Court had occasion to state:

> "While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole."

and that if the Court is not to be "merely the judicial echo of the Board's conclusion" a Board determination must be set aside when the record clearly precludes that determination from being justified by a fair estimate of the worth of the testimony of witnesses or the Board's informed judgment on matters within its special competence or both.

The trial examiner's decision discusses testimony and exhibits of record bearing on various factors relevant to, and to which the examiner attached significance in, the determination of the debit agents' status

as employees or independent contractors. These factors embrace most of those mentioned in our opinion in the earlier case involving the Company's Pennsylvania debit agents (*United Insurance Company of America* v. *N.L.R.B.*, 7 Cir., 304 F. 2d 86). But, on the record in the instant proceeding, the examiner, although professing that he was not overlooking the Company's testimony that in order to meet or avoid the Board's earlier findings (set aside in *United Insurance, supra*) it had advertently set about to and had made changes, including revisions in the manual the Company furnishes its debit agents, to more clearly reflect the independent contractor status; and while finding that the Company does not fix the agent's hours for debit collections and other services on his debit, and that the agent is permitted to retain his commission from the premiums collected, proceeded to find that the testimony concerning certain of the Company's requirements and practices evidenced such right of control as dictated a conclusion that the agents are employees.

In this latter connection the examiner found that (1) the agent is required to make a weekly report and settlement of account at his district office in the morning of a designated day, use forms specified and furnished by the Company, and comply with its accounting procedures; (2) on the day he so reports there usually is a sales meeting with the district manager which the agent is required to attend, followed by group and individual meetings and discussions between the agents and the assistant manager to whom each agent is assigned; (3) the agent receives assistance from and is subject to supervision by the assistant manager to whom he is assigned; (4) transfers of policyholders between agents are subject to Company approval; and (5) the Company pays travel expense,

provides rent, postage, and telephone, as well as office space in its district office for the agent's use when he comes in to make his weekly report and accounting, and to pick up mail and telephone messages.

We find no support in the record for some of these findings and but tenuous support for others. Those which are supported by substantial evidence are, in our opinion, consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the "manner and means" by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors.

There is lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. In this respect the record merely discloses that where the policyholders making up an agent's debit are dispersed over a large area his commission is 1% more than the normal rate. There is no payment of the agent's actual travel expenses. The record does not establish that the Company furnishes or reimburses the agent for postage. It shows only that if a policyholder mails a premium to the district office together with his premium receipt book the Company mails the book back to the policyholder at its own expense. With respect to "rent", "telephone" and the furnishing of "office space" the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and

accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him.

There is testimony that where a policyholder moves from the area serviced by the debit agent or the agent secures a new policyholder outside of the area normally serviced by him[4] he may arrange, subject to Company approval, with the agent who does serve the area involved for a transfer of the policyholder to the latter. There is other testimony that transfers are freely made between agents without first securing Company approval. In any event, it is our opinion that this transfer of business factor is not of critical significance. Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent.

There is testimony, some of which is not harmonious, concerning the "assistance" furnished and "supervision" exercised by the Company assistant managers, each of whom is assigned a group of four or five debit agents. Thus, while it appears that the assistant manager's association with the debit agent continues after the agent's initial training period, and the assistant manager may determine if and when he elects to accompany the agent on his rounds in the servicing of his debit, there is also testimony that the primary purpose for so doing is to assist the agent in the conservation of business—the calling on policyholders in

[4] Each agent has a state-wide license to solicit insurance and is not restricted by the Company in obtaining new business.

connection with lapsed policies—and aiding the agent in procuring new business on which the latter receives the commissions. The assistant manager reviews the agent's reports, requires him to make necessary changes if the accounting is not correct, and cautions the agent about poor production when necessary. During periods of an agent's absence from his debit for a week or more because of illness, or while taking a vacation, the assistant manager, if available, will take over for the agent. Thus, while the assistant manager assists the agent and "supervises" the agent in the latter's relationship with and accounting to the Company it is hardly a supervision which entails the control of the "manner and means" as distinguished from the results the agent is required to obtain. The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The testimony concerning attendance of sales meetings and with respect to discussion conferences with the assistant manager on the occasions of the weekly reports to the district office if appraised as evidencing Company insistance upon such attendance is, nevertheless, equivocal. The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts.

The trial examiner's appraisal of the testimony upon

which his fiindings relating to the above factors were predicated was made on the basis of a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, a former employee-debit agent of Quaker and the chairman of the Union's local, whose display of "evident partisanship" was recognized, "was a reliable witness" and "I credit his testimony generally" as contrasted to what the examiner characterized as "the patently unreliable aspects" displayed by the Company's witnesses.[5]

And the appraisal of the testimony so made by the trial examiner, and the resulting findings he made from the testimony he credited, were accompanied by and made in the context of his observation that:

> "To the extent if any that I may rely on demeanor in the hearing room, I would now report that without exception the agents did not display or appear to have attributes of independence (not even when the 'ringleader' appeared to assert himself as he testified), but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard."

[5] The General Counsel presented the testimony of two witnesses Scott and Don Ramon Jenkins, both of whom were members of the Union and had been employee-debit agents of Quaker before becoming agents for the Company. Jenkin's comparatively abbreviated testimony supported that of Scott in some particulars. The Company presented the testimony of four of the debit agents, and it was stipulated that the testimony of six others, identified for the record, would be of the same general tenor as that of the four who testified. Additional Company witnesses included its vice-president and general counsel, its agency vice-president, and the district manager, who was formerly a Quaker manager.

and of his reasoning, set forth in a footnote, that:

> "* * * there appears to be no good reason for excluding demeanor in the courtroom when the witness is not on the stand and where it is clearly observable as in this case; * * * Without attempting to detail the basis for this necessarily subjective finding, and allowing for an independent contractor's possible concern over renewal or termination of his contract, I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

A witness' demeanor as a criterion of credibility is generally related to a witness' manner while on the stand or manner of testifying. And although the off-the-stand appearance or conduct of the witness may properly be considered in determining his credibility when it constitutes an observable physical fact, the off-the-stand demeanor here relied upon by the examiner was not based on his observation of a simple physical fact but was predicated upon such subtle manifestations of human reactions as "obsequiousness" and "courtesy" to which the examiner applied his own view or predilection as to what attitudes are "characteristic" of relationships between employers and employees and between independent contracting parties. In our opinion resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an ac-

ceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs* v. *Szentes,* 130 Conn. 229, 33 A. 2d 124.

In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor "observation" made by the examiner. But we do not perceive how this disavowal can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. *Cf. Wheeler* v. *N.L.R.B.,* D.C. Cir., 314 F. 2d 260, 263; *N.L.R.B.* v. *American Federation of Television and Radio Artists,* 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinct impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the "employee attitude" the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor.

Thus, in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions.

The Company's petition to set aside the Board's order is granted, and, consequently, the Board's petition for enforcement of its order is denied.

Order set aside and enforcement denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS 60604

Wednesday, December 21, 1966

Before Hon. WIN G. KNOCH, *Circuit Judge,* Hon. LATHAM CASTLE, *Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge.*

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO, INTERVENOR

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
UNITED INSURANCE COMPANY OF AMERICA, INTERVENOR

PETITIONS TO REVIEW AND CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on petitions to review an order of the National Labor Relations Board, the answer and cross-petition for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Company's petition to set aside the order entered in this cause by, the National Labor Relations Board on July 28, 1965, be, and the same is hereby granted; and the Board's petition for enforcement of its order be, and the same is hereby denied, in accordance with the opinion of this Court filed this day.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

U.S. GOVERNMENT PRINTING OFFICE: 1967